VIJAYALAKSHMI DEVI NADCHATIRAM

v.

SARASWATHY DEVI NADCHATIRAM

HIGH COURT MALAYA, SEREMBAN
DATO' MOHD NOOR ABDULLAH J
[ORIGINATING SUMMONS NO: 24-465-95]
23 MARCH 1996

CIVIL PROCEDURE: *Jurisdiction - High Court - To maintain proper and orderly proceedings in Court - Inherent jurisdiction to maintain - Whether available - Whether inherent jurisdiction statutorily curtailed - Legal Profession Act 1976 - Legal Profession (Practice and Etiquette) Rules 1978.*

LEGAL PROFESSION: *Professional discipline - Whether Counsel should be disqualified from representing client - Legal Profession (Practice and Etiquette) Rules 1978 - Pecuniary interest - Personal relationship - Difficulty in maintaining professional independence - Incompatible with best interest of administration of justice.*

CONSTITUTIONAL LAW: *Fundamental liberties - Right to Counsel - Counsel of own choice - Whether right to Counsel of own choice subservient to duty of Court in administration of justice - Personal relationship - Whether Counsel should be disqualified from representing client.*

CIVIL PROCEDURE: *Estoppel - Doctrine of acquiescence - Whether doctrine of acquiescence can be invoked to defeat a clear statutory provision - Whether statutory duties can be avoided by way of estoppel - Whether plaintiff's delay a continuing statutory breach - Whether doctrine of acquiescence applied against plaintiff.*

This was an application by the plaintiff for an order that the defendant (who is practising law under the name of M/s. N Saraswathy Devi) do cease to act as advocate and solicitor for some of the litigants in the various actions ('the said actions') herein relating to the estate of one Nadchatiram. All the parties to the said actions, including both the plaintiff and the defendant, are family members of the said Nadchatiram.

The plaintiff submitted that the defendant is closely related to the parties in the said actions, and by representing them, had placed herself in a situation of conflict of interest and duty in that the defendant has a direct pecuniary interest in the matters litigated.

The defendant submitted that the Court had no jurisdiction to hear the instant application as the plaintiff had failed to specify the provisions which could confer the essential jurisdiction upon the Court, either under the Legal Profession Act 1976 ('the Act') or the Legal Profession (Practice and Etiquette) Rules 1978 ('the Rules'). The defendant further submitted that the inherent jurisdiction of the Court to deal with the instant application was taken away by the provisions of the Act and the Rules. It was also the defendant's contention that every litigant is free to choose the advocate and solicitor of his or her own choice. The defendant also submitted that as there was considerable delay by the plaintiff in bringing the instant application, the doctrine of acquiescence should be invoked.

The primary issues that arose for decision were: (i) whether the Court had the jurisdiction to entertain the instant application; (ii) whether conflict of interest and duty arose from the defendant's representation; (iii) whether the doctrine of acquiescence applied; and (iv) whether the relief sought by the plaintiff was an injunction.

Held:

[1a] The Court is the fountain of justice and the guardian against injustice. It lies with the Court to control and maintain the proper and orderly conduct of proceedings in Court so that justice is done and injustice thwarted. To carry out this solemn responsibility, it is essential that the Court has the inherent jurisdiction to do whatever is necessary to discharge that responsibility.

[1b] The provisions of both the Act and the Rules are independent of the Court's inherent jurisdiction to deal with undisciplined or unethical advocates and solicitors in any Court proceedings; they do not detract from or curtail the power of the Court. If it were otherwise, the Court would be toothless.

[2a] Rule 27(a) of the Rules absolutely prohibits an advocate and solicitor from appearing in any matter where he or she is pecuniarily interested directly. Rule 3(b)(ii) of the Rules provides that an advocate and solicitor shall not accept a brief where there is some personal relationship between him or her and a party or a witness in the proceedings. Rule 5(a) of the Rules provides that an advocate and solicitor shall not accept any brief if such acceptance renders or would render it difficult for him to maintain his professional independence or is incompatible with the best interest of the administration of justice.

[2b] In the instant case, the blood relationship between the defendant and the litigants is so closely connected that the defendant's duty to the Court became subordinate to her obligations to her clients or was otherwise

marred by her personal feelings for one party as against another, thereby putting her personal interest over her head and her duty to the Court under her feet. The Court must not allow it.

[3a] The freedom of choice of a litigant to choose his or her own advocate and solicitor is subject to the paramount duty of the Court to administer justice properly and fairly. And the Court does not administer justice properly and fairly if and where the public observes that justice is not done or seen to be done. Surely, justice is not seen to be done if an advocate and solicitor has a pecuniary interest in the matter under litigation or if he or she is proximately related to the litigants.

[3b] Where the proper administration of justice requires that an advocate and solicitor be prevented from acting for a particular litigant, the Court may so order after giving due weight to the public right/interest that a litigant should not be deprived of his or her choice of Counsel without good cause.

[4a] The defendant has a statutory obligation to observe and comply with the Rules. The relevant rules which the defendant had breached are mandatory and absolute in nature. The defendant's non-compliance with these rules was not vindicated by the plaintiff's failure to object to it earlier. Acquiescence, waiver, and estoppel do not apply to abrogate compliance with statutory obligations of an absolute nature.

[4b] Statutory duties cannot be avoided by way of estoppel in whatever form. For acquiescence to arise, there must be assent, either express or implied. The doctrine of acquiescence cannot be invoked to defeat a clear statutory provision. The statutory breach herein was a continuing one and delay could not apply to bar the plaintiff's instant application.

[5] The plaintiff's instant application was directed at the conduct of the substantive proceedings; it relied on the Court's inherent jurisdiction. The instant application was not brought to refrain a threatened breach of confidence. The plaintiff was seeking to disqualify the defendant on the ground of conflict of interest and duties arising out of the latter's pecuniary interest and conduct, and the close relationship of the parties. The nature of the relief sought by the plaintiff was not akin to that of an injunction.

[Plaintiff's application allowed]

Cases referred to:
Myers v. Elman [1940] AC 282 ***(refd)***
Karpal Singh v. Atip bin Ali [1987] 1 MLJ 112 ***(refd)***
Everingham v. Ontario [1992] 88 DLR (4th) 755 ***(foll)***
Attorney-General v. Arthur Lee Meng Kuang [1987] 1 MLJ 206 ***(refd)***
Grimwalde v. Meagher & Ors. [1995] 1 VR 446 ***(cit)***

Sayers v. Collyer [1994] CA 103 ***(cit)***
Maritime Electric Co. Ltd. v. General Diaries Ltd. [1937] All ER 748 ***(foll)***
United Malayan Banking Corporation Bhd. v. Syarikat Perumahan Luas Sdn. Bhd. (No. 2) [1988] 3 MLJ 352 ***(refd)***
Surajmull v. Triton Insurance Co. Ltd. ***(cit)***
Municipal Board, Lucknow v. Debi Das AIR [1926] Oudh 388 ***(cit)***
Express Newspapers plc. v. Liverpool Daily, Post & Echo & Ors. plc. [1985] 3 All ER 686 ***(cit)***
Nwakobu v. Nzekwn [1964] 1 WLR 1019 (PC) ***(cit)***
Black v. Taylor [1993] 3 NZLR 417 ***(foll)***

Legislation referred to:
Legal Profession Act 1976, ss. 99, 103E(1)
Legal Profession (Practice and Etiquette) Rules 1978, rr. 3(b)(ii), 5(a), 27(a)

Other source referred to:
The Law of Advocates and Solicitor in Singapore and West Malaysia, Tan Yock Lin, p. 90

For the plaintiff - S. Subramaniam; M/s. Satha & Co.
For the defendant - Saraswathy Devi; M/s. N. Saraswathy Devi
For the Bar Council - Sulaiman Abdullah (Hector Fernandez with him)

JUDGMENT

Mohd Noor Abdullah J:

The Facts

The defendant is an advocate and solicitor of the High Court of Malaya and has practised law for over 36 years and is currently practising law under the name and style of M/s. N. Saraswathy Devi.

Messrs N. Saraswathy Devi is retained by the defendant in Originating Summons No. 24-502-89. In this action Vijayalakshmi Devi applies for an order against Jegadevan and Danapakia Devi, the executors and trustees of the Estate of Nadchatiram, for the last will and true and perfect inventory and account of the said Estate. The order as prayed was made on 8 November 1989.

In another action Vijayalakshmi sues Jegadevan for the return of a memorandum of transfer in Form 14A which the said Vijayalakshmi signed was a blank form to effect family settlement which did not materialise. It is alleged that Jegadevan and the defendant made Vijayalakshmi sign the blank form. In this action at Seremban High Court (Suit No. 22-154-92), the defendant appears as Counsel for Jegadevan. Vijayalakshmi obtained the order as prayed on 9 February 1993.

In another related action Mahadevi sues Jegadevan *vide* Originating Summons No. 24-286-90 for an order transferring to herself a piece of land registered in the name of Nadchatiram Realities (1960) Sdn. Bhd. Jegadevan appears in person. Mahadevi's action was dismissed on 29 March 1994 and she appealed to the Federal Court and in that appeal No. 02-175-94 the defendant's law firm represents Jegadevan.

In yet another action, Vijayalakshmi in the name of Nadchatiram Realities (1960) Sdn. Bhd. applies for an order nullifying the declaration of trust executed by the officers of the company on 16 May 1980 in favour of Mahadevi in respect of a certain piece of land. This action No. 22-34-91 is consolidated with Originating Summons No. 24-286-90 where the defendant's firm represents Jegadevan in the Federal Court.

Vijayalakshmi also files an action against Suseela Devi for an order re-transferring 70 shares of the company which were unlawfully transferred to her. The said Suseela Devi who was represented by M/s. Mahadevi Nadchatiram & Partners is now represented by the defendant's law firm.

The family dispute escalates. Dr. Mahadevan, Danapakia and Vijayalakshmi joined forces to commence an action against Jegadevan for fraud or fraudulent breach of trust in relation to the Estate of Nadchatiram. In this action No. 22-61-93 Jegadevan initially acted in person. Later the defendant's law firm files a summons-in-chambers seeking to terminate the action by Dr. Mahadevan and Danapakia. The defendant's firm also acts for Jegadevan.

In this present action Jayalakshmi applies for an order that Saraswathy Devi Nadchatiram who is practising law under the name and style of M/s. Saraswathy Devi or any of her legal assistants do cease to act as advocate and solicitor for:

(1) Jegadevan in case No. 24-346-92, 22,61,93 and 22-61-93, 02-175-94, 02-260-94, 02-483-95;

(2) Suseela Devi in case No. 22-95-93 and case No. 22-54-95;

(3) Shanti Thiruchelvasegaram in case No. S2-22-562-93; and

(4) any of the brothers and sisters of the defendant in any proceedings relating to the Estate of Nadchatiram and of Nadchatiram Realities (1960) Sdn. Bhd. (in liquidation) where Vijayalakshmi is a party to the proceedings.

Bar Council

It might be pertinent to state promptly that the Bar Council is represented at this proceeding, at the request of the plaintiff who has served the relevant documents on the Council but at the displeasure of and with an objection from

the defendant. In my view an application to disqualify any member of the Bar Council from acting or continuing to act for any party in any Court proceeding concerns the Bar Council and I accordingly allow its representative to be present as *amicus curae*.

Jurisdiction

It is submitted that the Court has no jurisdiction to entertain this application where the plaintiff fails to specify the provisions which confer jurisdiction upon the Court either under the Legal Profession Act, 1976 or the Legal Profession (Practice and Etiquette) Rules 1978 or any other Rules.

The Court is the fountain of justice and the guardian against injustice. It lies with the Court to control and maintain the proper and orderly conduct of proceedings in Court in order that justice be done and injustice thwarted. To achieve this solemn responsibility it is essential that the Court should have the inherent jurisdiction to do whatever is necessary to discharge that responsibility. In *Myers v. Elman* [1940] AC 282 @ 319 Lord Wright said, "The Court has a right and a duty to supervise the conduct of its solicitors and the Court would be failing in the discharge of that duty if it passed over the conduct of the defendants' solicitors in this litigation in silence." Tan Yock Lin in his book *The Law of Advocates and Solicitors in Singapore and West Malaysia* at p. 90 cited several instances where a solicitor should decline from representing a litigant and opined that the Court could order the offending solicitor to bear the costs thrown away or subject him to disciplinary action, adding further "that the Court has an inherent jurisdiction where the facts are made known at the outset to restrain the offending solicitor or Counsel from acting further in the cause." Seah SCJ in *Karpal Singh v. Atip bin Ali* [1987] 1 MLJ 112 said, "An advocate and solicitor is an officer of the Court and his professional conduct is always under the supervision and scrutiny of the Court. It follows that when there is a dereliction of duty on the part of an advocate and solicitor in the conduct of his professional work the Court may in a proper case order him to be personally liable for the costs of the proceedings after giving him an opportunity to defend himself." In *Everingham v. Ontario* [1992] 88 DLR (4th) 755 @ 761-2 it was said that "it is within the inherent jurisdiction of a superior Court to deny the right of audience to Counsel when the interest of justice so requires by reason of conflict or otherwise. This power does not depend on the rules of professional conduct made by the legal profession and is not limited to cases where the rules are breached."

Any complaint concerning the conduct of any advocate and solicitor shall be in writing and shall in the first place be made or referred to the Disciplinary Board which shall deal with such rules as may be made from time to time (s. 99 of the Act) and any party aggrieved by any decision or order of the Disciplinary Board shall have the right to appeal to the High Court (s. 103E(1) of the Act).

a It is submitted that the inherent jurisdiction of the Court to deal with such matter is taken away from the Court by these provisions. In my view these provisions are independent of and do not detract from or curtail the power of the Court in its inherent jurisdiction to deal with undisciplined or unethical advocates and solicitors in any Court proceeding for otherwise the Court is b toothless.

Conflict of Interest

The plaintiff states that the defendant, by representing the litigants in the various actions and matters, is placed in a situation of conflict of interest and duty in c that the defendant is directly pecuniarily interested in the matters litigated and is an embarrassment to all the parties as all of them are the siblings of Nadchatiram (deceased) and thereby the defendant by so remaining is likely to bring the administration of justice and the integrity of the Court and the judicial process into disrepute and shame.

d *(a) Pecuniary Interest*

In both cases No. 24-346-92 and 22-95-93, Jegadevan and Suseela Devi rely on an alleged agreement entered into sometime in 1990. (Exh. NVD 14). They also rely on a letter dated 12 December 1985 written by their mother, the e late Rajapakiam (Exh. NVD 12). The documents relied on by the litigants and are disputed confer on the defendant ¼ share in the land held under CT. No. 16120 Lot 2551 in the Mukim of Rasah, approximately 50 acres in area valued at RM9 million and this is in addition to the 10 acres the defendant purchased from Dr. Mahadevan.

f Rule 27(a) of the said Rules 1978 absolutely prohibits an advocate and solicitor from appearing in any matter where he or she is directly pecuniarily interested.

An advocate and solicitor who has a personal stake in the result of the litigation because of his pecuniary interest tends to forget the principles which are the g bedrock of his profession and becomes either over-zealous in the preparation of pleadings and the conduct of the case or otherwise becomes indifferent to the high ethical standard of his profession. He cannot remain detached and maintain objectivity but becomes subjectively and personally interested only to win the case for him to share the fruits of success. This is sufficiently demonstrated in these cases with the dearth of documents, affidavits and h endless assertions and counter-assertions, the exchange of verbal unpleasantness between opposing Counsels interspersed by the parties themselves that at one state the Court forbade anyone to speak unless beckoned to do so.

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(b) Personal Relationship

The parties to all the actions are the siblings of Nadchatiram, most of whom are advocates and solicitors. Properties worth millions of Ringgit are at stake. The siblings bite not at the fruits of their father's labour but they gnaw at each others flesh and blood.

Rule 3(b)(ii) of the said Rules 1976 provides that an advocate and solicitor shall not accept a brief where there is some personal relationship between him and a party or a witness in the proceedings.

Rule 5(a) of the said Rules 1976 provides that an advocate and solicitor shall not accept any brief if such acceptance renders or would render it difficult for him to maintain his professional independence or is incompatible with the best interest of the administration of justice.

Mohd. Azmi SCJ in *Attorney-General v. Arthur Lee Meng Kuang* [1987] 1 MLJ 206 @ 209 said, "As a result of his failure to observe these Rules, there is every likelihood that the advocate has allowed his duty towards the Court to become subordinate to that owed to his clients with whom he has a common interest in the subject matter of the litigation."

In another twist of events the feud between the children of Nadchatiram exacerbates with the introduction and role of Shanti, the plaintiff's daughter. She has alleged incestuous relationship with her father, allegedly a scheme perpetrated by the opposing faction. A libel action follows. In another action by the plaintiff, Shanti appears with the defendant for the opposing party, hence the plaintiff's daughter is pegged against her. The action goes on and on with the defendant inside the ring rather than remaining outside it.

Here the blood relationship between the defendant and the litigants is so closely connected that the defendant's duty to the Court becomes subordinate to her obligation to her client or is otherwise marred by her personal feelings for one party against the other thereby putting her personal interests over her head and her duty to Court under her feet. The Court must not allow it.

Right to Choose Counsel

It is submitted that every litigant is free to choose the advocate and solicitor of his choice to represent him. Here the defendant is retained by the litigants, both brother and sister, who have faith in the defendant as being the best person to represent them. Why should that choice be curtailed?

The answer is: that choice is subject to the paramount duty of the Court to administer justice properly and fairly, and the Court does not administer justice properly or fairly where a fair-minded reasonably informed member of the public observes that justice is not done or seen to be done and surely justice is not

seen to be done where an advocate and solicitor has a pecuniary interest in the matter under litigation or where the advocate and solicitor is so proximately related to the litigants, either or both.

Where the proper administration of justice requires that Counsel be prevented from acting for a litigant the Court may so order after giving due weight to the public interest that litigants should not be deprived of their choice of Counsel without good cause – *Grimwalde v. Meagher & Ors.* [1995] 1 VR 446.

Acquiescence

It is further submitted that the first case was filed in 1993 and is followed by a series of cases. Three years have passed – decisions have been made by one Court and upheld or reversed by a higher Court, various applications were made, much time, effort and money have been spent, and only now the plaintiff complains that the defendant is disqualified to act further for the opposing party in the various litigation. The defendant cites the case of *Sayers v. Collyer* [1994] CA 103 for the proposition that the plaintiff therein has lost his right to enforce his covenant either by injunction or damages through his acquiescence in the proceeding of the defendant.

The defendant as an advocate and solicitor has a statutory obligation to observe and comply with the said Rules 1978. These rules have statutory force and non-compliance would render the advocate and solicitor liable to disciplinary proceedings. The relevant rules which the defendant has breached are mandatory and absolute in nature. Non-observance of the mandatory rules is not dispensed with merely because the plaintiff or her solicitor has not objected earlier. Acquiescence, waiver and estoppel do not apply to dispense compliance with the statutory obligations of absolute character.

In *Maritime Electric Co. Ltd. v. General Diaries Ltd.* [1937] All ER 748 @ 753 Lord Maugham in delivering the judgment of the Privy Council said, "Where as here the statute imposes a duty of a positive kind not avoidable by the performance of any formality for the doing of the very act which the plaintiff seeks to do, it is not open to the defendant to set upon estoppel to prevent it. This conclusion must follow from the circumstances that an estoppel is only a rule of evidence which in special circumstances can be invoked by a party to an action, it cannot therefore avail, in such a case, to release the plaintiff from an obligation to obey such a statute nor can it enable the defendant to escape from a statutory obligation of such a kind on his part ... the duty of each party is to obey the law ... the Court should first of all determine the nature of the obligation imposed by the statute, and then consider whether the admission of an estoppel would nullify the statutory provision."

The proposition is that we cannot avoid our statutory duties by estoppel in whatever form. In *United Malayan Banking Corporation Bhd. v. Syarikat Perumahan Luas Sdn. Bhd. (No. 2)* [1988] 3 MLJ 352 @ 356 Edgar Joseph Jr. J citing the Privy Council in *Surajmull v. Triton Insurance Co. Ltd.* said:

> No Court is at liberty to enforce as valid, that such a statute has declared shall not be valid nor can compliance therewith be dispensed with ever by consent of the parties or by failure to plead or argue the point at the outset.

Secondly if the plaintiff has no power to dispense with the compliance of the statutory obligations nor power to consent, acquiescence cannot arise at all. For acquiescence to arise, there must be assent, express or implied. The doctrine of acquiescence cannot be invoked to defeat a clear statutory provision. *Municipal Board, Lucknow v. Devi Das* AIR [1926] Oudh 388.

Estoppel or acquiescence cannot be relied upon merely because the defendant's client had spent time, energy and money and would suffer further hardship to retain another solicitor. The scale of inconvenience and hardship is evenly balanced in the plaintiff's disfavour occasioned by the defendant's refusal to observe statutory obligation to disqualify herself at the outset.

The statutory breach is a continuing one, delay cannot apply to bar the plaintiff's application. See *Express Newspapers plc. v. Liverpool Daily, Post & Echo & Ors. plc.* [1985] 3 All ER 686. Also where justice itself demands that the defendant should not act in the several matters or any other matters there cannot be any injustice to the defendant or her clients. They have not suffered and would not suffer any detriment or prejudice. Therefore acquiescence or delay is not applicable. See *Nwakobu v. Nzekwn* [1964] 1 WLR 1019 (PC).

Finally, the defendant raises an issue that the true nature of the relief sought by the plaintiff is an injunction and since there has been acquiescence and delay on the party of the plaintiff, an injunction should not be granted.

The plaintiff's application is directed to the conduct of the substantive proceedings and rely on the Court's inherent jurisdiction. The application is not brought to refrain a threatened breach of confidence. The plaintiff is seeking to disqualify the defendant on the ground of conflict of interest and duties arising out of her direct pecuniary interest, close relationship of the parties and the conduct of the defendant.

In *Black v. Taylor* [1993] 3 NZLR 417 @ 418 Mckay J said:

> The application in this case is not for a *quia timet* injunction to restrain the breach of obligation of confidence. It is based on the inherent jurisdiction of the Court to control the proceedings before the Court. It is brought on the ground of conflict of interest making it improper for Mr. Gazley to act as solicitor or Counsel.

Conclusion

Tuan Hj. Sulaiman b. Abdullah who appeared for the Bar Council states that the Bar Council is impartial in the dispute between the parties. However noting that the defendant is closely related to the parties in all the cases and nothing further that the defendant has a pecuniary interest in the matters under litigation, the Bar Council is of the view that the defendant should not only be disqualified from acting or continuing to act for her relatives but should have withdrawn herself from so acting at a very early stage and not subjected herself to this embarrassment, to which I would add, a humiliation for an advocate and solicitor of 36 years' standing and experience. With that remark I allow the plaintiff's application as prayed with cost.

Reported by Harjit Singh Pannu &
Gan Peng Chiang